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Extended Immunity for Workmen's Compensation Insurer: State Compensation Insurance Fund v. Superior Court of Siskiyou County (Cal. 1965)

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CASE NOTES

EXTENDED IMMUNITY FOR WORKMEN'S COMPENSATION INSURER: *STATE COMPENSATION INSURANCE FUND v. SUPERIOR COURT OF SISKIYOU COUNTY* (CAL. 1965)

Under the workmen's compensation laws, an employee who has been injured during the course of employment has a right to recover from his employer's insurer, regardless of the employee's own negligence.[1] This being admitted, there is an additional problem when the insurer undertakes to inspect the work premises and negligently fails to perform its duties. In such a case, the question is whether the employee who was injured as a result of the negligent inspection has a common law cause of action against the insurer. The problem in California has been resolved in *State Compensation Insurance Fund v. Superior Court of Siskiyou County*, a case of first impression.[2]

THE FACTS OF THE CASE

Breceda, the real party in interest, brought an action in the Superior Court of Siskiyou County against his employer's insurance carrier for negligent inspection of the work premises. In May, 1961, he was employed by Arcata Lumber Services, Inc., in Siskiyou County. He suffered injuries when a pile of lumber fell on him while he was operating a forklift. Breceda subsequently received a compensation award and medical expenses in the proceedings before the Industrial Accident Commission. These expenses were paid by the petitioner as Arcata's compensation carrier. Breceda then brought the challenged superior court action, alleging that his employer's insurer had assumed a duty to inspect the premises where Breceda was working,[3] and had either negligently failed to inspect the prem-

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[1] Workmen's compensation statutes are based on a new theory of compensation which is distinct from the prevailing theories of damages. They do not rest on any theory of wrongful conduct or negligence on the part of the employer. Some courts have gone so far as to say that these laws were enacted with the deliberate purpose of changing the legal relationships of the parties involved in accidents arising out of and in the course of workingmen's employment as they existed under the common law. See SCHNEIDER, WORKMEN'S COMPENSATION TEXT § 6 (3d ed. 1941).

[2] 237 A.C.A. 499, 46 Cal. Rptr. 891 (1965).

[3] The contract provision was: "State Compensation Insurance Fund . . . does

ises, or in inspecting them, had performed the act negligently, thus proximately causing Breceda's injuries. The plaintiff-employee contended that the duty to inspect was a duty in addition to the carrier's usual obligations as insurer. It was further alleged by Breceda that the obligation thus assumed by the carrier was not only for the benefit of plaintiff's employer, Arcata, but also for the benefit of the employees of Arcata.

The carrier demurred on the ground that the court lacked jurisdiction, claiming that the Industrial Accident Commission had exclusive jurisdiction. The court overruled the demurrer and the carrier brought the present petition for a writ of prohibition. The issue which the district court was asked to determine was whether an employee injured in the course of employment can maintain a common law cause of action for negligence against his employer's compensation insurer, where the negligence of the insurer is a failure to fulfill its commitments with the employer regarding safety inspections. The district court issued the writ of prohibition.

Previous California Cases in Collateral Areas

In its decision, the *Breceda* court considered the judicial precedents in collateral areas, primarily because there was no case directly on point.[4] The case of *Fitzpatrick v. Fidelity & Casualty Co.*[5] was cited as a pilot state court decision. In *Fitzpatrick*, an employee had suffered a back injury and a cast was applied by his personal physician; later, the insurer's physician required removal of the cast, replacing it with another. This so aggravated the injury that it caused death. A demurrer to the complaint was sustained against Fitzpatrick's widow on the ground that the superior court lacked jurisdiction. In affirming the lower court, the California Supreme Court held that:

> . . . where the recovery for an injury sustained by or the death of an employee comes within the provisions of the Workmen's Compensation Act, the Industrial Accident Commission has exclusive jurisdiction and the superior court may not entertain an action for damages against the employer or his insurance carrier, the latter being subrogated to all the rights and duties of the employer.[6]

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hereby agree . . . (3) To Serve the Insured (a) by the inspection of work places covered by the Policy when and as deemed desirable by the Fund and thereupon to suggest to the Insured such changes or improvements as may operate to reduce the number or severity of injuries during work, and (b) upon notice of injury, by investigation thereof and by adjustment of any resulting claims in accordance with the law . . . ."

[4] There was no case on point in California where an insurer's failure to perform a duty, such as failure to inspect the work premises, was the cause of the original compensable injury.

[5] 7 Cal. 2d 230, 60 P.2d 276 (1936).

[6] *Id.* at 233, 60 P.2d at 278.

In *Fitzpatrick*, the court restated the rule set forth in *Sarber v. Aetna Life Ins. Co.*[7] There the court pronounced:

> . . . [W]e are of the opinion that the *original accident was the proximate cause of the damages* in this action, and the State Compensation Act provides what the Legislature has deemed just and adequate compensation for all such injuries. If we are correct in this conclusion, there is little room to doubt that the remedy thus provided is exclusive of all other remedies . . . and that the exclusive provisions of the Compensation Act cannot be evaded by bringing an action in some other form or under some other name.[8]

THE COURT'S REASONING IN THE BRECEDA CASE

In this case of first impression, the court, in effect, was asked to determine sections 3852 and 3850 of the Labor Code.[9] In reaching its decision, the court reasoned that the California Legislature was given the plenary power to create a complete workmen's compensation act under the state's constitution.[10] This section of the state constitution gives the legislature the power to secure safety in places of employment and to make provisions for regulating insurance coverage in all its aspects.

Next, the majority of the court inquired into the provisions of the Workmen's Compensation Insurance and Safety Act which became the basis for the Labor and Insurance Codes. This act referred to the safety provisions and the regulations of the insurance coverage in all its aspects as initially set forth in the constitution.[11]

From a study of the California Constitution and the Workmen's Compensation Act, the court concluded that:

> The process of insuring thus is made an integral part of the system . . . . Demonstrating that the insurer is an integral part of the system is the provision made by the Act that whenever the insurer has acknowledged the existence of its policy and has assumed liability it is substituted for the employer in all subsequent proceedings. The employer is thereafter relieved from liability.[12]

After a consideration of the relevant sections of the state constitution and the Workmen's Compensation Insurance and Safety Act, the *Breceda* court had no difficulty in ruling in favor of the insurer's interpretation of sections 3852 and 3850 of the Labor Code. Section 3852 states:

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[7] 23 F.2d 434 (9th Cir. 1928).

[8] *Id.* at 435. (Emphasis added.)

[9] Other sections of the CAL. LAB. CODE were considered briefly by the court, however, their primary concern was to interpret these two sections.

[10] CAL. CONST. art. XX, § 21.

[11] 237 A.C.A. at 503, 46 Cal. Rptr. at 893.

[12] *Id.* at 503-504, 46 Cal. Rptr. at 893-894.

> The claim of an employee for compensation does not affect his claim or right of action for all damages proximately resulting from such injury or death against *any person other than the employer*.[13]

Section 3850 states that: "As used in this chapter: . . . . (b) 'Employer' includes insurer as defined in this division."[14]

The carrier argued that if these sections were read together, then the insurer received the employer's immunity and could not be a third person subject to a common law cause of action under section 3852.

Breceda, on the other hand, had argued in the lower court that: (1) the general definition of "employer" under section 3300[15] should be applied in construing section 3601,[16] and that sections 3852 and 3850 could be ignored as being intended to have reference only to subrogation rights and procedure; and (2) when the whole philosophy of workmen's compensation insurance and safety is examined, the conclusion would be that actions such as this were outside the exclusive dominion of the Industrial Accident Commission. The district court recognized the cogency of Breceda's argument, but rejected it.

Analysis of the Breceda Court's Decision

The conclusion of the *Breceda* court is that when an employer's compensation insurer contracts to perform an employer's obligation to make safety inspections, the insurer, in assuming the contracted-for duty, does not lose its status as an insurer in its relationship with the employee of the insured employer and become a third person within the meaning of section 3852, which preserves the employee's action for damages against any person other than the employer. From an analysis of the opinion, it becomes clear that the reasoning of the court can be questioned from several vantage points.

Public Policy

First of all, the overriding consideration in the minds of the majority of the court was public policy. The court clearly states its position:

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13 Cal. Lab. Code § 3852. (Emphasis added.)

14 *Id.* at § 3850.

15 This section provides: "As used in this division, 'employer' means: (a) The State and every State agency. (b) Each county, city, district, and all public and quasi public corporations and public agencies therein. (c) Every person including any public service corporation, which has any natural person in service. (d) The legal representative of any deceased employer." Nowhere in this section is insurer defined as employer.

16 This section provides: "When the conditions of compensation exist, the right to recover such compensation, pursuant to the provisions of this division . . . the exclusive remedy against the employer for the injury or death."

> We are also impressed with the public policy argument that should the court accept Breceda's posit all compensation carriers would be compelled either to strike the provision for inspection from their policies or substantially raise their premiums to cover their exposure to greater monetary outlays; that working conditions left to the inexpert administration of employers, particularly the smaller ones, would deteriorate and that therefore one of the principal purposes of the system of workmen's compensation, namely, the fostering of safe working conditions, would be defeated. In seeking legislative intent the courts must consider the consequences which will flow from a particular interpretation.[17]

Contrary to this line of reasoning, it has been argued that there are no overriding policy considerations compelling tort immunity for insurers. It has been the position of some observers that while the employer's insurer does step into the shoes of the employer with respect to certain of the employer's duties, it by no means follows that the employer's immunity from tort liability extends or should extend to the insurer in all situations.[18] Thus it has been said:

> While it may be true that an insurer supports and furthers the compensation system by affording a vehicle of protection as an alternative to a monopolistic state fund or self-insurance, it does so for purely business reasons and appears to enjoy a quite successful participation in the scheme.[19]

The same writer goes on to say that no inspection might be better than a negligent inspection since the employer might be prompted to make a more vigorous effort to provide for job safety.[20] Instead of cessation of safety inspections, the threat of common law liability should result in increased competence in inspection techniques by the insurer to ensure that the inspections are not performed in a negligent manner.[21]

The *Nelson* case,[22] which fostered the above article, can be distinguished insofar as the inspection was a gratuitous one and insofar as Illinois did not have the statutory immunity of California. Nevertheless, there is certainly some merit in the argument that public policy is in fact a poor reason for extending employer's immunity to the insurer acting as inspector.

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[17] 237 A.C.A. at 507, 46 Cal. Rptr. at 896.

This argument of the court is only true if the insurer is undertaking total inspection responsibility. However, the insurer could reserve the right to inspect without undertaking the responsibility to inspect, and thus accomplish what the court seeks in the present case.

[18] Note, 51 VA. L. REV. 347 (1965).

[19] *Id.* at 351.

[20] *Ibid.*

[21] *Id.* at 352.

[22] Nelson v. Union Wire Rope Corp., 31 Ill. 2d 69, 199 N.E.2d 769 (1964).

Logical Extension of the Rule

Aside from the question of public policy, there is also the problem of how far such immunity will extend. The court's decision seems to indicate that the insurer *qua* inspector has the immunity of the insured employer. If this is so, the workmen's compensation law has been extended in such a way that an insurer can at once act as an inspector, thereby reaping the benefits of such an added inspection provision, without the concomitant duty attaching.

The majority of the court argued that the very name of the act, Workmen's Compensation, Insurance and Safety Act, expresses the tripartite coverage and are interrelated. Their reasoning seems to be that since safety is contemplated in the act, the immunity should extend to safety inspection by the insurer. The majority recognized that if an employer should contract out the duty to inspect to an independent safety engineer, other than his insurer, the safety engineer would be liable in a court of law for negligent performance of the contracted-for duty.[23]

The Source of the Injury

The final problem which deserves mention is the court's reliance on the *Fitzpatrick* decision and cases which have followed that line of thinking.[24] In using the *Fitzpatrick* line of reasoning, the court failed to recognize the very basic difference between it and the present case under consideration. That is, the *Fitzpatrick* case stands for the proposition that aggravation by an insurer of an existing compensable injury does not place the insurer in the position of a third party subject to a common law cause of action. It has been said:

> In this situation, of course, any negligence on the part of the insurance carrier was not a cause of the original injury, and it is . . . easier to construe statutory language making the remedy under the compensation exclusive, as extending to aggravation of the original injury, no matter through whose fault.[25]

On the other hand, the present case was one where the employee was injured in the course of employment, but the negligence of the carrier contributed to the original compensable injury. The basic difference in the fact pattern has led other courts in other jurisdictions to find liability on the part of the carrier, absent statutory immunity.[26] If this distinction is recognized, then, absent statutory

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23 237 A.C.A. at 506, 46 Cal. Rptr. at 896.

24 *E.g.*, Hazelwerdt v. Industrial Indemnity Exchange, 157 Cal. App. 2d 759, 321 P.2d 831 (1958); Noe v. Travelers Ins. Co., 172 Cal. App. 2d 731, 342 P.2d 976 (1959).

25 Annot., 93 A.L.R.2d 598, 600 (1964).

26 *E.g.*, Nelson v. Union Wire Rope Corp., 31 Ill. 2d 69, 199 N.E.2d 769 (1964);